

ORIGINAL

RECEIVED & FILED

1 CURTIS R. TINGLEY (SBN 112322)
 ctingley@tingleyllp.com
 2 BRUCE C. PIONTKOWSKI (SBN 152202)
 bpiontkowski@tingleyllp.com
 3 JONATHAN A. MCMAHON (SBN 239370)
 jmcMahon@tingleyllp.com
 4 TINGLEY PIONTKOWSKI LLP
 10 Almaden Boulevard, Suite 430
 5 San Jose, California 95113
 Telephone: (408) 283-7000
 6 Facsimile: (408) 283-7010

'09 FEB 12 11:39

U.S. BANKRUPTCY COURT
NORTH DISTRICT OF CALIF.

7 Attorneys for Palm Terrace Claimants

8 UNITED STATES BANKRUPTCY COURT

9 DISTRICT OF NEVADA

11 In re:

12 USA COMMERCIAL MORTGAGE
13 COMPANY,14 USA CAPITAL REALTY ADVISORS,
15 LLC,16 USA CAPITAL DIVERSIFIED TRUST
DEED FUND, LLC,17 USA CAPITAL FIRST TRUST DEED
18 FUND, LLC,

19 USA SECURITIES, LLC,

20 Debtors.

21 Affects:

22 All Debtors
 23 X USA Commercial Mortgage Company
 24 USA Capital Realty Advisors, LLC
 25 USA Capital Diversified Trust Deed Fund, LLC
 26 USA Capital First Deed Fund, LLC
 27 USA Securities, LLC

Case No. BK-S-06-10725-LBR
 Case No. BK-S-06-10726-LBR
 Case No. BK-S-06-10727-LBR
 Case No. BK-S-06-10728-LBR
 Case No. BK-S-06-10729-LBR

CHAPTER 11

Jointly Administered Under Case No.
 BK-S-06-10725-LBR

**RESPONSE TO FOURTH OMNIBUS
 OBJECTION OF USACM TRUST TO
 PROOFS OF CLAIM BASED ON PALM
 TERRACE LITIGATION**

Date: February 20, 2009

Time: 9:30 a.m.

Courtroom 1

Honorable Linda B. Riegler

26 The Palm Terrace Claimants (as defined in the Fourth Omnibus Objection of USACM
 27 Trust to Proofs of Claim Based Upon Palm Terrace Litigation) hereby respond to the USACM
 28 Liquidating Trust's Fourth Omnibus Objection of USACM Trust to Proofs of Claim Based Upon

1 Palm Terrace Litigation as follows:

2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. BACKGROUND**

4 1. On or about February 1, 2006, sixteen investors (the "Palm Terrace Plaintiffs") in an
5 apartment complex known as the Palm Terrace Apartments in Las Vegas, Nevada filed an action
6 in the Santa Clara County Superior Court (the "Palm Terrace Litigation") against the seller of the
7 apartments and several other individuals and businesses involved in the sale. The Palm Terrace
8 Plaintiffs' Complaint alleged causes of action for fraud, negligent misrepresentation, breach of
9 fiduciary duty, unfair competition, false advertising, negligence, conspiracy, and aiding and
10 abetting. At the heart of the Palm Terrace Plaintiffs' causes of action was the allegation that they
11 and their lender, LaSalle Bank, had been provided false information, in the form of rent rolls for
12 the apartments, regarding the apartment complex's financial situation.

13 2. Among the defendants in the Palm Terrace Litigation were USA Commercial Mortgage
14 Company ("USACM") and Andrew Hantges ("Hantges"), who held himself out as a Vice
15 President of USACM. (See the Declaration of Jonathan A. McMahon filed concurrently herewith
16 (the "McMahon Decl.") at ¶ 11). Hantges represented the Palm Terrace Plaintiffs as their
17 mortgage broker in the transaction to purchase the apartment complex. (See McMahon Decl. ¶ 5).
18 In his haste to close the deal, Hantges submitted false information in the form of rent rolls and
19 other financial documents, which he signed, to the Palm Terrace Plaintiff's lender. (See
20 McMahon Decl. ¶¶ 7-10). This false information, which overstated the amount of rental income
21 the apartments would generate, allowed the Palm Terrace Plaintiffs to obtain their loans and close
22 escrow on the complex.

23 3. On November 6, 2006, the Palm Terrace Claimants (as defined in the Fourth Omnibus
24 Objection of USACM Trust to Proofs of Claim Based Upon Palm Terrace Litigation) filed their
25 claims against USACM, alleging that their liability, if any, in the Palm Terrace Litigation arose
26 due to the actions of Andrew Hantges, acting on behalf of USACM as the mortgage broker for the
27 Palm Terrace Plaintiffs.

28 4. In or around November 2008, the parties to the Palm Terrace Litigation, with the

1 exception of USACM, entered into a confidential settlement agreement and the Palm Terrace
2 Litigation was dismissed.

3 5. At least a portion of the confidential settlement was funded by one or more of the Palm
4 Terrace Claimants' insurance carriers. The Palm Terrace Claimants, however, did incur
5 \$184,965.74 in legal fees arising out of the Palm Terrace Litigation that was not funded by any
6 insurance carrier. (See McMahon Decl. ¶¶ 2, 3).

7 6. On January 16, 2009 the USACM Trust filed its Notice of Hearing and First, Second,
8 Third, and Fourth Omnibus Objections USACM Trust to Proofs of Claim Based Upon Palm
9 Terrace Litigation.

10 7. The USACM Trust's Notice of Hearing states that, pursuant to Local Rule 2007(b),
11 this response must be filed by February 13, 2009.

12 **II. RESPONSE TO OBJECTIONS**

13 **a. Claims Are Not Duplicative.**

14 8. At the time the Palm Terrace Claimants filed their individual proofs of claim, the Palm
15 Terrace Litigation was ongoing and the Palm Terrace Claimants could only estimate each of their
16 individual liability arising out of the litigation. Thus, each Palm Terrace Claimant filed an
17 individual claim.

18 9. As a result of the confidential settlement of the Palm Terrace Litigation, the Palm
19 Terrace Claimants now know the amount of their liability arising out of the litigation. Of the
20 settlement funds, costs, and attorney's fees incurred in defending the Palm Terrace Litigation,
21 \$184,965.74 were not paid by any insurance carrier. Palm Terrace Claimant WOW Enterprises,
22 Inc. (Claim # 10725-00918) incurred \$184,965.74 in legal fees arising out of the joint defense of
23 the Palm Terrace Litigation and the remaining Palm Terrace Claimants have assigned their claims
24 in these proceedings to claimant WOW Enterprises, Inc. (See McMahon Decl. ¶¶ 2, 3).

25 10. USACM Trust is correct in that the claims originally filed by the Palm Terrace
26 Claimants do not accurately state the amount of their claims as of this date. WOW Enterprises,
27 Inc.'s claim (Claim # 10725-00918), however, remains valid in the amount of \$184,965.74. (See
28 McMahon Decl. ¶¶ 2, 3).

1 **b. The Palm Terrace Claimants Have Standing.**

2 11. At least a portion of the confidential settlement of the Palm Terrace Litigation was
3 funded by one or more of the Palm Terrace Claimants' insurance carriers. The Palm Terrace
4 Claimants, however, did incur \$184,965.74 in legal fees arising out of the Palm Terrace Litigation
5 that was not funded by any insurance carrier. This amount has been charged to Claimant WOW
6 Enterprises, Inc. (Claim # 10725-00918) and the remaining Palm Terrace Claimants have
7 assigned their claims in these proceedings to WOW Enterprises, Inc. (*See* McMahon Decl. ¶¶ 2,
8 3).

9 12. The Palm Terrace Claimants, therefore, have been damaged in the amount of
10 \$184,965.14 and consequently have standing to bring their actions against USACM.

11 **c. The Palm Terrace Claimants Do Not Come With Unclean Hands**

12 13. A proof of claim is presumed valid under Bankruptcy Rule 3001(f). "[A] proof of
13 claim is prima facie evidence of the validity of the claim. Although the creditor bears the
14 ultimate burden of persuasion, the debtor must come forward with evidence to rebut the
15 presumption of validity." *In re Southern Calif. Plastics, Inc.* 165 F.3d 1243, 1248 (9th Cir.
16 1999) (emphasis added). In its Fourth Omnibus Objection, the USCAM Trust has offered no
17 evidence that any of the Palm Terrace Claimants were complicit in, or had knowledge of, the
18 fraud perpetrated by Hantges on the Palm Terrace Plaintiffs. The USCAM Trust, therefore, has
19 not presented sufficient evidence to rebut the presumption of validity of the Palm Terrace
20 Claimants' claims.

21 14. Evidence discovered during the Palm Terrace Litigation shows that Hantges filled out
22 and signed falsified Multifamily Rent Rolls, Income and Expense Statements, and Collateral
23 Information Questionnaires. (*See* McMahon Decl. ¶¶ 7-10). These were forms provided to
24 Hantges by the Palm Terrace Plaintiffs' lender, LaSalle Bank, and submitted by Hantges to the
25 lender in order to secure the loans to purchase the apartments. (*Id.*) Any fraud that was
26 committed during the transaction to purchase the Palm Terrace Apartments was perpetrated by
27 Hantges, acting in his capacity as a mortgage broker for USACM. The Palm Terrace Claimants
28 do not come with unclean hands. The Palm Terrace Claimants, therefore, are entitled to

1 indemnification and contribution from USACM in the amount of \$184,965.74.

2 **d. The Doctrine of Respondeat Superior Applies**

3 15. At all times during the transaction to purchase the Palm Terrace Apartments, Hantges
4 held himself out to be acting on behalf of USACM. Evidence obtained during discovery in the
5 Palm Terrace Litigation shows that Hantges sent emails to the various parties from the email
6 address ahantges@usacapitalcorp.com. (See McMahon Decl. ¶ 8). The signature block on
7 Hantges' emails identified him as "Andrew Hantges, CCIM, USA Commercial Mortgage." (Id.)
8 Hantges also sent the Palm Terrace Plaintiffs Letters of Interest on USA Commercial Mortgage
9 letterhead which identified him as "Vice President, USA Commercial Mortgage." (See McMahon
10 Decl. ¶ 11) No argument can be made that Hantges was not acting within the course and scope of
11 his duties at USACM.

12 16. Furthermore, Debtor has provided no evidence that Hantges was not acting in the
13 scope and course of his employment with USACM. A proof of claim is presumed valid and, in
14 an objection, the debtor must come forward with evidence to rebut the presumption of validity.
15 *In re Southern Calif. Plastics, Inc.* 165 F.3d 1243, 1248 (9th Cir. 1999). USACM has not
16 presented any evidence that the doctrine of respondeat superior does not apply.

17 **e. The Palm Terrace Claimants Are Not *In Pari Delicto***

18 17. See Paragraphs 13 and 14 above.

19 **f. The Palm Terrace Claimants Did Not Fail to Mitigate Their Damages.**

20 18. See Paragraphs 8 through 10 above.

21 19. In addition, the USACM Trust has provided no evidence that the Palm Terrace
22 Claimants failed to mitigate their damages, despite its obligation to do so. See *In re Southern*
23 *Calif. Plastics, Inc.* 165 F.3d 1243, 1248 (9th Cir. 1999)

24 **III. CONCLUSION**

25 For the forgoing reasons, the Palm Terrace Claimants respectfully ask the Court to
26 overrule the USACM Trust's objections to the claims arising out of the Palm Terrace Litigation
27 and allow such claims in the amount of \$184,965.74.

28 ///

1 Dated: February 11, 2009

TINGLEY PIONTKOWSKI LLP

2
3 By:


JONATHAN A. MCMAHON
Attorneys for Palm Terrace Claimants